GOVERNMENT CONTRACTS

BID PROTESTS ENTER A SHIFTING LANDSCAPE

Protests challenging the awarding of federal contracts have become increasingly contentious as contractors fight for a limited pool of government dollars. Two recent protest decisions of the U.S. Court of Appeals for the Federal Circuit will have a significant impact on contracts and protests—but contractors should be prepared for potential fundamental changes to the protest process itself.

Contractors wishing to challenge the awarding of a federal government contract can protest in several forums: the procuring agency, the Government Accountability Office, or the U.S. Court of Federal Claims (CFC). The Federal Circuit—which sits in appellate review of the CFC—weighs in on protests infrequently. "But the Federal Circuit took up two significant bid-protest questions in the past year," says Anuj Vohra, a partner in Crowell & Moring's Government Contracts Group and a former trial attorney in the Department of Justice's Commercial Litigation branch. These cases looked at agencies' obligations to procure commercially available items and the appropriate scope of agency corrective action.

The first of these cases began in 2015, when Palantir, an information technology and data solutions company, filed a pre-award protest at the GAO challenging an Army procurement for a $206 million data-driven intelligence system. Palantir argued that the Army had tailored the procurement to the development of an entirely new system without considering whether a commercial solution was already available—which Palantir believed it offered—to meet the Army's needs. In so doing, Palantir argued, the Army violated the Federal Acquisition Streamlining Act of 1994, which requires agencies to utilize commercial solutions to meet their needs "to the maximum extent practicable."

After the GAO denied the protest, Palantir took the case to the CFC and won, in a decision published in 2016. The government then appealed that ruling to the Federal Circuit. In September 2018, a three-judge panel unanimously affirmed, concluding that the Army had indeed failed to conduct a FASA-mandated analysis of the availability of a commercial solution to meet its needs.

By affirming the CFC decision, says Vohra, "the Federal Circuit has confirmed that an agency must undertake a fulsome analysis of the availability of commercial items to meet its needs. And if the agency doesn't, there is now a decision out there that provides the basis for a legitimate protest claiming that the agency failed to meet its obligations under FASA. So from the protestors' perspective, this is significant, and it puts another arrow in their quiver."

The second case—*Dell Federal Systems, LP v. United States*—considered an agency's ability to craft corrective action taken in response to a protest. Several IT contractors had been awarded contracts to supply computer systems—desktops, laptops, and so forth—to the Army. In response to protests filed by multiple unsuccessful offerors, the Army announced it would take corrective action by conducting discussions and requesting revised proposals. The original winning bidders filed a case at the CFC, saying that the corrective action was too broad and therefore improper. The CFC agreed, finding that an agency's corrective action needed to be "narrowly tailored" to address the specific error(s) identified in a protest, and thereby limiting the discretion that agencies have in determining such actions.

"That was surprising, because the courts have usually been highly deferential to an agency's determination of what constitutes appropriate corrective action," says Vohra. That surprise was relatively short-lived, however. In October 2018, the U.S. Court of Appeals for the Federal Circuit reversed the lower court, reaffirming that corrective action is assessed under a "rational basis" standard.

DOD: TURNING TO STREAMLINED AGREEMENTS

Those cases will have a real impact for contractors, but they should be viewed against the background of other trends that could bring even deeper change to the world of bid protests. For example, the Department of Defense is especially interested in procurement reform and looking to enter into agreements by way of its "Other Transaction Authority" (OTA).

An OTA agreement allows an agency to engage nonprofits, research institutions, and private-sector companies without the constraints of the traditional federal procurement process. The goal is to make it easier for innovative companies that don't usually work with the government—typically, tech companies—to do so. It's not a new idea: NASA has possessed similar authority since the late 1950s. The DoD has had authority to issue OTA agreements since the 1990s, but in 2016, Congress authorized the DoD to more freely utilize them for actual production contracts without competition, so long as the award of such an OTA followed a prototype OTA that had been subject to competition.

This change is significant. OTAs appeal to the DoD because access to innovative technology is key to its mission, and the

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availability of production OTAs should streamline the process from prototype development to availability to the end user. "This lets them work with contractors not only to develop but also to produce new and not readily available goods, typically in the IT arena and other highly technical industries," says Vohra. "It gives them an opportunity to pull innovation from Silicon Valley and the types of contractors that don't typically perform government contracts."

In addition, OTAs make it easier to forge a contract with a vendor because they limit delays and complications. "An OTA is not subject to the requirements of the Federal Acquisition Regulation," says Vohra. "And importantly, the award of an OTA is not generally protestable. To the extent that the DoD wants to avoid the protest process and its attendant delays, the use of OTAs may provide a means for doing so." With Congress taking almost yearly action to encourage the DoD to use OTAs, he says, "contractors should pay close attention to how the DoD uses them in the coming year."

The use of OTA awards likely won't eliminate protests altogether. While the award of an OTA itself is not subject to protest, the GAO has exercised its jurisdiction to consider whether the DoD's use of its OTA, as opposed to a more traditional procurement mechanism, was appropriate. And the CFC has not yet weighed in on agency use of OTAs (or even the question of whether it could). Thus, the DoD's decision to enter into more OTA agreements is likely to increase the amount of litigation surrounding the breadth of that authority.

MORE CURRENTS OF CHANGE

Vohra also points to the Section 809 Panel, created as part of the 2016 National Defense Authorization Act, which is exploring a variety of changes to streamline the government procurement process, including protest reform. The panel's final report is expected in January 2019. But ideas discussed by the panel over the past year, Vohra says, have included eliminating the GAO's and CFC's jurisdiction over protests of DoD procurements, or creating a new forum within DoD to expedite the protest process by resolving them in as little as 10 days.

For its part, Congress continues to express an interest in procurement reform, including changes to the bid protest process. The John S. McCain NDAA for FY 2019, passed in August 2018, directs the DoD to study the frequency and effects of bid protests at both the GAO and the CFC, and to develop a plan for an expedited protest process for DoD procurements valued at less than $100,000.

Overall, says Vohra, "there is this overarching possibility that we will see significant changes to the protest process. That change is likely to be incremental, and we're likely a ways away from an entirely different process. But this definitely is something that government contractors need to be aware of and thinking about."

THE MATERIALITY QUESTION CONTINUES

In 2016, the U.S. Supreme Court's *Escobar* ruling clarified that False Claims Act liability may result from a contractor's implied certification of compliance with statutory, regulatory, or contractual requirements if compliance with a particular requirement was "material" to whether the government would have paid a vendor. "Since then, the salient question has been how to determine materiality," says Crowell & Moring's Anuj Vohra. "How do you figure out whether your noncompliance with a requirement is something that would have triggered the government's payment or nonpayment?"

The stakes can be high: In early 2018, a Florida district court pointed to the rigorous *Escobar* standards for materiality in vacating a $347 million jury verdict in an FCA case against a group of nursing home operators, noting that despite being aware of the contractor's noncompliance with the contractual requirement in question, the government had continued to pay the contractor's claims (*U.S. ex rel. Ruckh v. Salus Rehab., LLC*).

Courts continue to struggle with the question of whether a misrepresentation about compliance with a requirement was material to the government's payment decision, and have raised the possibility of discovery as a way to answer it. "Motions to dismiss FCA claims have sometimes been denied because the courts have said that based on what we know right now, we just can't tell. So they have allowed discovery that speaks to materiality," says Vohra. That may be a key point going forward, he adds. "Discovery on materiality is something attorneys for the government and for the contractors defending against claims will continue to face in the coming year—and it's something that can make difficult False Claims Act defenses that much more complicated."